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IN THE
COURT OF APPEALS OF INDIANA

DELFINO MONDRAGON,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 49A02-0605-PC-378
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable W.T. Robinette, Judge Pro Tempore
Cause No. 49G03-9808-PC-141165

January 18, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-petitioner Delfino Mondragon appeals the denial of his petition for post-conviction relief, claiming that he was improperly sentenced. Specifically, Mondragon contends that he was entitled to relief because the trial court improperly identified certain aggravating factors in violation of the rule announced in Blakely v. Washington, 542 U.S. 296 (2004) when enhancing his sentence, and that his appellate counsel was ineffective for failing to challenge the trial court's finding of aggravating circumstances in his direct appeal. Finding no error, we affirm the judgment of the post-conviction court.

FACTS

The facts as reported in Mondragon's direct appeal are as follows:

> In July 1998, J.O., who lived next door to Mondragon, was playing at Mondragon's house. During this time, Mondragon sodomized J.O. and placed his penis in J.O.'s mouth.
>
> . . .
>
> The record reveals that J.O. and his family lived next door to Mondragon and his family. J.O. was playing at Mondragon's house when Mondragon took J.O. into his bedroom, sodomized him and placed his penis in J.O's mouth. J.O. testified to these events at trial. J.O.'s sister testified that when she knocked on the door to retrieve her brother from Mondragon's house, no one answered the door. She went home and then returned and knocked again, and Mondragon came to the door while pulling up his pants. The doctor who examined J.O. also testified that J.O. had a fissure in the anal area which is consistent with an incident of sexual abuse.

Mondragon v. State, No. 49A05-9908-CR-374, slip op. at 2, 3 (Ind. Ct. App. Feb. 11, 2000).

As a result of these incidents, Mondragon was charged with two counts of child molesting as a class A felony, and two counts of child molesting as a class C felony. Following his convictions on the two class A felony charges, the trial court sentenced

Mondragon to the maximum term of fifty years[1] on each count, which were ordered to run concurrently with each other. In arriving at this sentence, the trial court identified the following aggravating factors: (1) the young age of the victim; (2) Mondragon violated his position of trust with the victim; (3) Mondragon was an illegal alien; and (4) Mondragon committed the acts of inserting his penis into both the anus and the mouth of the victim and ejaculating or urinating into the child's mouth. No mitigating circumstances were identified.

Thereafter, Mondragon directly appealed to this court, arguing that the evidence was insufficient to support his convictions. In an unpublished memorandum decision of February 11, 2000, this court affirmed Mondragon's convictions. Mondragon then filed a pro se petition for post-conviction relief on February 3, 2005. Thereafter, On November 29, 2005, Mondragon filed an amended petition for post-conviction relief, claiming that he was improperly sentenced and that his appellate counsel was ineffective. Specifically, Mondragon alleged that all aggravating factors relied upon by the trial court were improper, and that his counsel on direct appeal was ineffective because he "failed to raise the issue on appeal that [the] sentence must be vacated where every aggravating factor relied upon by the court was improper." Appellant's App. p. 53. Following a hearing on the petition, the post-conviction court denied Mondragon's request for relief on September 28, 2006.

In relevant part, the post-conviction court ruled as follows:

C. Failure to Object to Cited Aggravating Factors Based upon Blakely.

[1] When Mondragon was sentenced, Indiana Code section 35-50-2-4 provided that "A person who commits a Class A felony shall be imprisoned for a fixed term of thirty (30) years, with not more than twenty (20) years added for aggravating circumstances or not more than ten (10) years subtracted for mitigating circumstances; in addition, he may be fined no more than ten thousand dollars ($10,000).

> Apprendi v. New Jersey, 530 U.S. 466 (2000) . . . and Blakely v. Washington, 124 S. Ct. 2531 (2004) . . . were decided in 2000 and 2004 respectively. Thus, both were decided after the trial/sentencing/appeal herein. It is well settled that it does not constitute ineffective assistance of counsel for an attorney to fail to anticipate changes in the law that have not occurred at the time of representation. Frazier v. State, 267 Ind. 24, 366 N.E.2d 1166. In as much as the sentencing herein was in all respects unexceptional, there was no reason, at the time, for trial counsel to object, or for appellate counsel to raise the issue. Therefore, the failure to raise the issue on appeal could not be an example of ineffective assistance of appellate counsel.
>
> Furthermore, in footnote 16 of Smylie v. State, 823 N.E.2d 679 (Ind. 2005), the Indiana Supreme Court wrote, "The fundamental error doctrine will not, as caselaw holds, be available to attempt retroactive application of Blakely through post-conviction relief. . . . Thus, it is clear that the holdings in Apprendi and Blakely cannot support granting relief in this case, as they were unavailable at all times relevant to the history of this case.

Supp. App. p. 78-79. The post-conviction court also considered the aggravating factors that the trial court identified in enhancing Mondragon's sentence, and determined that they were all valid. Mondragon now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Before addressing Mondragon's claims of error, we note the general standard under which we review the denial of a petition for post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004); Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Walker v. State, 843 N.E.2d 50, 56 (Ind. Ct. App. 2006). On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-

conviction court. Id.

We also note that the post-conviction court in this case entered findings of fact and conclusions thereon in accordance with Indiana Post-Conviction Rule 1(6). Id. "A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made." Id. In this review, we accept findings of fact unless clearly erroneous, but we accord no deference to conclusions of law. Id. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses. Id.

II. Mondragon's Arguments

A. Freestanding Claims of Error

Mondragon argues that he was improperly sentenced. Specifically, Mondragon asserts that the sentence was erroneous because the trial court's enhancement of his sentence beyond the statutory presumptive term for the offenses violated the rule announced in Blakely because the aggravating circumstances were not found by a jury beyond a reasonable doubt.

In addressing Mondragon's claims, we note that on June 26, 2000, the United States Supreme Court held in Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Four years later, in Blakely v. Washington, 542 U.S. 296, 303, (2004), the Supreme Court interpreted the term " 'statutory maximum' for Apprendi purposes [as] the maximum

sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

In analyzing the Indiana sentencing scheme in light of Blakely, our Supreme Court noted that "[w]hile many who read Apprendi deduced that "statutory maximum" meant "statutory maximum," the Blakely majority chose to define it as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.'" Smylie v. State, 823 N.E.2d 679, 682-683 (Ind. 2005) (citing Blakely, 542 U.S. at 303). Further, the Court held:

> While Blakely certainly states that it is merely an application of "the rule we expressed in Apprendi v. New Jersey, 542 U.S. at 301, 124 S.Ct. at 2536, it is clear that Blakely went beyond Apprendi by defining the term "statutory maximum." As the Seventh Circuit recently said, it "alters courts' understanding of 'statutory maximum'" and therefore runs contrary to the decisions of "every federal court of appeals [that had previously] held that Apprendi did not apply to guideline calculations made within the statutory maximum." Simpson v. United States, 376 F.3d 679, 681 (7th Cir. 2004)(collecting cases). Because Blakely radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent, we conclude that it represents a new rule of criminal procedure. Smylie, 823 N.E.2d at 687.

Our Supreme Court ultimately held that, "as a new rule of constitutional procedure," Blakely would be applied "retroactively to all cases on direct review at the time Blakely was announced," but "a defendant need not have objected at trial in order to raise a Blakely claim on appeal inasmuch as not raising a Blakely claim before its issuance would fall within the range of effective lawyering." Id. at 690-91.

When considering the above, we note that this court handed down Mondragon's direct appeal on February 11, 2000—nearly four months before Apprendi was decided.

Mondragon did not seek transfer, and the opinion was certified on March 27, 2000. Hence, Mondragon's direct appeal was final more than four years before Blakely was decided on June 24, 2004. As a result, Blakely is not applicable in this case, and Mondragon is precluded from raising his freestanding sentencing claims regarding the trial court's identification of aggravating circumstances. See Sanders v. State, 765 N.E.2d 591, 592 (Ind. 2002) (holding that free-standing claims of error can only be raised in a post-conviction proceeding in connection with a petitioner's claims of ineffective assistance of counsel).

B. Ineffective Assistance of Counsel

Mondragon asserts that his counsel on direct appeal was ineffective for failing to argue that the trial court considered improper aggravating circumstances in enhancing his sentence. As a result, Mondragon argues that the sentence must be set aside.

In addressing this claim, we apply the same standard of review to claims of ineffective assistance of appellate counsel as we apply to claims of ineffective assistance of trial counsel. Williams v. State, 724 N.E.2d 1070, 1078 (Ind. 2000), cert. denied, 531 U.S. 1128 (2001). To prevail on a claim of ineffective assistance of counsel, a petitioner must demonstrate both that his counsel's performance was deficient and that the petitioner was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984), cert. denied, 534 U.S. 830 (2001). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002).

To satisfy the appropriate test for prejudice, the petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. Failure to satisfy either prong will cause the claim to fail. Id. Because the strategic decision regarding which issues to raise on appeal is one of the most important decisions to be made by appellate counsel, appellate counsel's failure to raise a specific issue on direct appeal rarely constitutes ineffective assistance. See Taylor v. State, 717 N.E.2d 90, 94 (Ind. 1999). Our supreme court has adopted a two-part test to evaluate the deficiency prong of these claims: (1) whether the unraised issues are significant and obvious from the face of the record; and (2) whether the unraised issues are "clearly stronger" than the raised issues. Bieghler v. State, 690 N.E.2d 188, 194 (Ind.1997), cert. denied, 525 U.S. 1021, (1998). If this analysis demonstrates deficient performance by counsel, the court then examines whether the issues that appellate counsel failed to raise "would have been clearly more likely to result in reversal or an order for a new trial." Id.

In determining whether Mondragon's appellate counsel was ineffective for failing to argue that the aggravating circumstances identified by the trial court were improper, we first note that Mondragon correctly observes that a trial court may not use an element of the offense as an aggravating factor. Reynolds v. State, 575 N.E.2d 28, 32 (Ind. Ct. App. 1991). Indeed, because a victim's age comprises a material element of the offense, it may not also support an enhanced sentence. Kile v. State, 729 N.E.2d 211, 214 (Ind. 2000). On the other hand, this court has determined that the particular facts of a case may be aggravating over and above the facts necessary to support the existence of the offense itself. See Kien v. State,

782 N.E.2d 398, 414 (Ind. Ct. App. 2003). In Stewart v. State, 531 N.E.2d 1146, 1150 (Ind. 1988), our Supreme Court held that the trial court properly considered the victim's "tender age" in a child molesting case as a proper aggravating factor in addition to other aggravating circumstances that were apparent from the record. See also Kien, 782 N.E.2d at 414.

In this case, Mondragon was charged with the offenses under Indiana Code section 35-42-4-3, which requires that the victim be under the age of fourteen. When Mondragon was sentenced, the trial court noted that the victim in this case was only seven years old, which was well below the threshold age of fourteen. Hence, the trial court commented that the physical and emotional trauma that the victim might endure would likely be enhanced. That said, it is apparent that the trial court's comment regarding the victim's young age was appropriately considered as an aggravating circumstance. Thus, Mondragon's claim that the trial court improperly considered an element of the offense as an aggravating circumstance fails.

Next, we note that our Supreme Court has determined that the violation of a defendant's position of trust with the victim is a valid aggravating factor. Bacher v. State, 722 N.E.2d 799, 802 (Ind. 2002). Moreover, this court has held that a "position of trust" by itself constitutes a valid aggravating factor upon which the trial court may properly enhance a defendant's sentence for child molesting and incest. Middlebrook v. State, 593 N.E.2d 212, 214 (Ind. Ct. App. 1992). Here, the evidence established that the seven-year-old victim was a neighbor child who frequently played with Mondragon's child at his residence. In our view, Mondragon's act of permitting such a young child to play at his house created a

position of trust between Mondragon and the victim. Thus, the trial court properly considered this violation of trust as an aggravating circumstance, and Mondragon's appellate counsel was not ineffective for failing to challenge that factor as improper.

Mondragon also contends that his appellate counsel was ineffective for failing to challenge the trial court's consideration of the nature and circumstances of the offense as an aggravating circumstance. Notwithstanding Mondragon's claim, this court has determined that the nature and circumstances of a crime is a proper aggravator so long as the trial court takes into consideration facts not require to prove the elements of the offense. Edwards v. State, 854 N.E.2d 42, 51 (Ind. Ct App. 2006). As noted above, the trial court commented that Mondragon either ejaculated or urinated into the victim's mouth when committing the offenses. Tr. p. 384. Neither of these acts is an element of the crime defined in Indiana Code section 35-42-4-3. Moreover, even though the insertion of Mondragon's penis into the victim's mouth and anus are elements of the charged offenses, it is apparent that the trial court pointed out that Mondragon's commission of the acts that were not elements of the crimes compounded the trauma that he caused the victim. Id. Inasmuch as the additional trauma resulting from the commission of the offenses was not an element of the crimes, the trial court did not err in considering the nature and circumstances of the offense as an aggravating factor. As a result, Mondragon's claim of ineffective assistance of appellate counsel on this basis fails.

Finally, Mondragon claims that his counsel on direct appeal was ineffective because he failed to challenge the trial court's finding that Mondragon's status as an illegal alien was

an aggravating factor. However, contrary to his argument, this court has held that a defendant's illegal alien status is a valid aggravator. Samaniego-Hernandez v. State, 839 N.E.2d 798, 809 (Ind. Ct. App. 2005). Thus, Mondragon's claim fails.

CONCLUSION

In light of our discussion above, we conclude that the rule announced in Blakely is not applicable in these circumstances, and Mondragon is precluded from raising his freestanding claims of error with regard to sentencing. Moreover, Mondragon has failed to show that his appellate counsel was ineffective for failing to challenge, on direct appeal, the validity of the aggravating circumstances that the trial court found when enhancing the sentence. As a result, Mondragon's petition for post-conviction relief was properly denied.

The judgment of the post-conviction court is affirmed.

DARDEN, J., and ROBB, J., concur.